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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

In re L.D. and JOHNATHAN D., Persons  
Coming Under the Juvenile Court Law.

MENDOCINO COUNTY DEPARTMENT  
OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

DARLENE A.,

Defendant and Appellant.

A143334

(Mendocino County  
Super. Ct. Nos. 1316712, 1316713)

Minors L.D. and Johnathan D. were made dependents of the juvenile court. Their mother, Darlene A. (mother), received 12 months of reunification services, but the court terminated those services due to ongoing substance abuse and domestic violence issues, and set a hearing pursuant to Welfare and Institutions Code<sup>1</sup> section 366.26 to determine a permanent plan for the children. The day before the hearing, mother petitioned the court pursuant to section 388, requesting that L.D. and Johnathan D. be placed in family maintenance with mother or, alternatively, that additional reunification services be provided to mother. After a hearing, the court denied the request and ordered that the children's step-grandmother and grandfather become the legal guardians.

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<sup>1</sup> All further unspecified statutory references are to the Welfare and Institutions Code.

Mother appeals the denial of her section 388 petition, arguing that the court abused its discretion because mother established that her circumstances had changed and that granting her additional services would be in the children's best interests. We find no error and affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On February 20, 2013, the Mendocino County Health and Human Services Agency (the Agency) filed a juvenile dependency petition pursuant to section 300. The petition alleged that nine-year-old L.D., eight-year-old Johnathan D., and five-year-old K.C. were at risk of suffering physical and emotional harm as a result of domestic violence between mother and her boyfriend, Julian S.<sup>2</sup> The court sustained the petition the following day and detained the three children. The children were placed in the care of their maternal grandmother and, approximately one month later, placed in the care of their step-grandmother.

The jurisdictional report filed on March 19, 2013, indicated that mother and her three children were members of the Coyote Valley Band of Pomo Indians of California (Coyote Valley Tribe). The report detailed a series of violent incidents between mother and Julian S. dating back to 2012. The last of these reported incidents occurred on January 7, 2013, when Coyote Valley Tribal Police went to mother's residence in response to a call about domestic violence. Police believed that mother had been battered by Julian S. Mother told the officers that the injuries on her face resulted from tripping over an electrical cord. Mother told police that Julian S., who had repeatedly been debarred from tribal lands, was not at her residence. Upon entering mother's residence, however, officers discovered Julian S. hiding in a crawl space under the residence. Officers also observed marijuana on the floor that was easily accessible to five-year-old K.C.

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<sup>2</sup> Julian S. is not the father of any of these children. L.D. and Johnathan D. have the same father, while K.C. has a different father. Their fathers are not parties to this appeal, and facts pertaining to them will only be included to the extent they have a bearing on this appeal.

The Agency filed an amended petition on April 22, 2013, which contained the same allegations regarding the potential for physical harm to the children that were in the original petition, minus allegations relating to potential emotional harm. The amended petition contained new allegations that L.D. and Johnathan D.'s father was unable to provide for them because he had an extensive criminal history, including substance abuse and assault against members of his family. The court held a jurisdiction hearing on May 2, 2013, at which mother submitted to the amended petition. The court found jurisdiction and scheduled a disposition hearing. The court provided notice of the disposition hearing to the Coyote Valley Tribe pursuant to the Indian Child Welfare Act (ICWA), 25 United States Code section 1901 et seq.

The Agency filed a dispositional report on May 20, 2013, in advance of the disposition hearing. The social worker who prepared the report stated that mother and Julian S. were maintaining a relationship together. Mother was due to have another child in August 2013, and Julian S. was the father of the unborn child. The social worker expressed "great concern" about domestic violence between mother and Julian S., but both mother and Julian S. denied the domestic violence. The social worker also reported that mother's visits with her children since the time they were detained had gone well. The social worker believed that "mother has done some really good parenting, because the children appear to be happy and cooperative children who listen," but that "the concern is the violence" between mother and Julian S. The social worker recommended that the three children be declared dependents of the court and proposed a reunification plan for mother that included domestic violence counseling, parenting classes, weekly visitations with the three children, and substance abuse treatment.

Lorraine G. Laiwa (Laiwa), an Indian expert witness involved in the case pursuant to ICWA,<sup>3</sup> filed a declaration in lieu of testimony prior to the dispositional hearing.

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<sup>3</sup> ICWA provides that "[n]o termination of parental rights may be ordered in [a state court] proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued

Laiwa stated that she was a member of the Manchester-Point Arena Band of Pomo Indians with over 33 years of experience “in providing services to Indian communities with special emphasis on families where child abuse/neglect treatment or prevention was a primary focus.” She was “thoroughly familiar with Native American customs and traditions with particular emphasis on Pomo cultural practices with respect to child-rearing.” Mother was in a relationship involving domestic violence that occurred in front of the three children, “putting them at risk of physical and emotional harm.” In her view, mother “has proven to be unable to provide the children with a home free from the negative effects of drugs, including the presence of drugs within the reach of five year-old [K.C].” She concluded “based upon my knowledge of Indian culture and my personal knowledge and review and supervision of this case, that it is in the children’s best interest to be placed in the home of their step-grandmother . . . while their parents participate in family reunification services.”

The court held a dispositional hearing on June 19, 2013. The court found that ICWA applied and declared the three children were dependents of the court. The court ordered the Agency to provide reunification services to mother and approved the reunification plan proposed by the Agency. The plan required mother to maintain regular visits with her children, to participate in parenting programs, to “[t]ake appropriate action to avoid being a victim of further domestic violence,” and to “[s]tay free from illegal drugs and show your ability to live free from drug dependency.” The court scheduled a six-month review hearing for November 7, 2013.

The Agency filed a 60-day interim review report on August 15, 2013. The social worker stated that mother provided a clean drug test two weeks earlier, although the social worker had not received additional drug testing results since then. The social worker reported that mother had been living at a domestic violence shelter but had recently moved out. According to the shelter’s director, Julian S. appeared at the shelter

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custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” (25 U.S.C. §1912(f).)

on one occasion and began banging on the door while yelling and screaming. The director contacted the police, but Julian S. left by the time police arrived. The shelter's director told mother that if she did not obtain a restraining order against Julian S., mother would have to leave. Mother did not seek a restraining order, and moved out of the shelter. An Agency social worker cautioned mother about maintaining a relationship with Julian S. and how it "could potentially affect her current situation."<sup>4</sup>

The Agency filed a six-month status review report on October 30, 2013, in which the social worker stated that "mother is participating in services minimally." Mother continued to engage in a relationship with Julian S, who the social worker described as "violent and uncontrollable." Mother attended some of the rehabilitative and counseling programs she was offered, and consistently tested negative for drug use. However, she did not attend any "Intake Support" sessions related to parenting despite being referred twice by social workers. Nor did she attend a women's empowerment program, contrary to representations she made to the social worker. As to the three children, the social worker stated that mother's weekly visits with the children were going well. They had been living with their step-grandmother and "have adapted well to this change in their lives and have support from their [step-grandmother] with school, ongoing visits with their parents, medical, and developmental." The step-grandmother "ensures that the children's medical needs are met and provides consistent structure and stability in the home." The Agency recommended ongoing placement for the children with their step-grandmother and that mother continue with reunification services. The court adopted the Agency's recommendation and set a 12-month review of reunification services for April 17, 2014.

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<sup>4</sup> Mother eventually filed a request for a restraining order against Julian S. in October 2013. The court granted a temporary restraining order and set a hearing for a permanent restraining order for December 2013. At the December 2013 hearing, mother's counsel informed the court that Julian S. could not be located for service. As such, the request for a permanent restraining order was deemed withdrawn and the court dissolved the temporary restraining order without prejudice.

By the time the Agency filed a 12-month status report on April 9, 2014, it recommended termination of mother's reunification services. According to the social worker who prepared the report, mother denied that she and Julian S. were together. However, the "Agency has received multiple reports that [mother] and [Julian S.] are in fact together and have been together." The social worker recounted two separate reports of violence involving mother and Julian S. The first incident occurred on January 2, 2014. Mother told the social worker that on that occasion, Julian S. "snuck into her home in the middle of the night" and attacked mother because she startled him. However, the police report for that incident indicates that Julian S. was staying at mother's residence with her consent. The second incident occurred on February 18, 2014, when Julian S. "chased [mother] by car when she was driving on the reservation."

The social worker also reported that mother tested positive for methamphetamine and amphetamine in March 2014. After testing positive, mother failed to attend meetings with the social worker to discuss her case plan, and failed to show up for a subsequent drug test later in March. In an addendum to the 12-month report filed on May 2, 2014, the social worker stated that mother continued to miss drug tests in April after the social worker filed the original report. The social worker stated that mother's infant child (who she had with Julian S.) "was detained by the Agency on April 17, 2014, due to the mother's substance abuse while caring for the young child."

As to the children, the social worker stated that "[t]he children's needs are being met by the [step-grandmother] and the children appear happy." Mother maintained regular visits with the children, although she missed one visit in January 2014 because she had a mark on her face that resulted from a domestic violence incident and she did not want the children to see it. Mother also told the social worker that she could not attend a visit planned for the end of March because she was enrolling in an out-of-town rehabilitation program. (However, in the May 2 addendum, the social worker reported that mother did not enter the rehabilitation program.) Mother was sent a letter on April 7 informing her that she needed to meet with the social worker to resume visitation, but mother did not respond to the letter. Mother met in-person with the social worker on

April 17, 2014, after a court appearance, telling the social worker she wanted to resume visits. The social worker told mother the visits could resume if mother called the day prior to a scheduled visit to confirm. However, according to the social worker, mother “did not call on April 29, 2014 to confirm and the visit on April 30, 2014 was cancelled. [Mother] also did not show or call regarding this visit.”

At the 12-month hearing on May 13, 2014, mother requested another six months of reunification services. Her counsel informed the court that mother began attending a 90-day residential drug treatment program at Friendship House in Oakland, and that she attempted to obtain another restraining order against Julian S. The children’s attorney argued that the court should terminate reunification services due to the recent drug use and because of the continued domestic violence between mother and Julian S. The Agency agreed with the children’s attorney, and told the court it was concerned with mother’s lack of honesty and the fact that she had not visited the children since March. Laiwa, the Indian expert witness, told the court that the Coyote Valley Tribe supported placing L.D. and Johnathan D. with their step-grandmother. Laiwa stated that the step-grandmother “has taken care of all of their needs medically and educational-wise. They are in a real stable position. I know that the tribe supports that.”

At the conclusion of the hearing, the court terminated mother’s reunification services. The court found that “it would be detrimental to return the children to mother at this time. Mother was provided reasonable services for the statutory period of 12 months. She did not make significant progress toward elevating or mitigating the causes necessitating placement of her children with a relative. There is not a substantial probability that the children could be returned to the physical custody of their mother within 18 months of the removal.” The court found that K.C. could be returned to the care of her father under a plan of family maintenance, and scheduled a section 366.26 hearing with regard to L.D. and Johnathan D. for September 10, 2014. The Agency provided notice of the section 366.26 hearing to the Coyote Valley Tribe.

The Agency filed a section 366.26 report with the court on September 3, 2014, in advance of the hearing. As of the date of the report, mother had only two visits with L.D.

and Johnathan D. since reunification services were terminated. The social worker stated that mother enrolled in the Friendship House program in May, and that mother had not requested any further visits with L.D. and Johnathan D. after she left Friendship House on August 18.

The social worker recommended that the children's step-grandmother and maternal grandfather (who was married to the step-grandmother) be appointed as legal guardians. The two children "have had a close relationship with the proposed guardians since they were born. The children are very attached to their step-grandmother and grandfather and they look to them for emotional support, for comfort and for the provision of their physical needs." The social worker believed the two grandparents "are committed to the permanent care of their grandchildren and are prepared to dedicate the time and energy needed to raise them until they become adults." The Agency provided the court with a resolution from the Coyote Valley Tribe stating that the Coyote Valley Tribe supported a plan of legal guardianship for L.D. and Johnathan D. with the step-grandmother.

On September 9, 2010—the day before the section 366.26 hearing—mother filed a section 388 petition requesting that L.D. and Johnathan D. be placed in family maintenance with mother or, alternatively, that additional reunifications services be provided to mother. Mother stated that she completed the Friendship House program in Oakland and received domestic violence counseling during her time with Friendship House, and that because she addressed her past domestic violence and drug abuse issues, it would be in the children's best interests for her to resume parenting. Mother attached certificates of completion from Friendship House and a women's empowerment group, as well as a support letter from a psychologist associated with Friendship House.<sup>5</sup>

The court continued the section 366.26 hearing scheduled for September 10, 2014, to September 16, and held the section 366.26 hearing concurrently with mother's 388

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<sup>5</sup> Mother attached a second support letter from the psychologist, but the court did not accept the letter in evidence because it was not signed and did not appear on letterhead. Mother has not challenged the exclusion of this letter on appeal.



petition. Mother was the only witness to testify at the hearing. Mother spoke about her experience at Friendship House, where she focused on resolving her substance abuse and domestic violence issues. Mother met with the psychologist associated with Friendship House at least once a week to speak about domestic violence, and learned how to strengthen and protect herself and her children from future domestic violence. Mother stopped having a relationship with Julian S. in February 2014, and stayed with Julian S. for as long as she did because she was pregnant with his child and “didn’t know any better.” Mother also testified about the relationship she had with L.D. and Johnathan D. She last saw the children on August 2, 2014, at a Native American function at Lake Mendocino. When L.D. and Johnathan D. showed up for the visit, they “ran over, hugged me. We hugged each other.” Mother and the children “had a lot of fun. We did a snow cone booth . . . and . . . gave snow cones out to all the other kids. . . . [W]e watched Indian dancing, made plates for seniors. So I had to show my children that we serve seniors first so that they made plates and handed them out to the seniors.”

At the conclusion of testimony, the children’s attorney argued that he opposed mother’s section 388 petition. He argued that “while factually her progress has been very, very solid,” mother had only shown that her circumstances were changing, but had not shown they completely changed. The children’s attorney argued that mother had not shown it would be in the children’s best interests to continue services, and that the tribe supported a guardianship plan with the step-grandmother and grandfather. The Agency concurred with the children’s attorney and opposed the section 388 petition. Laiwa informed the court that mother’s youngest child (the infant born in 2013) had been living in the same home as L.D. and Johnathan D. since being detained.

The court denied mother’s section 388 petition. The court stated, in pertinent part: “I really am impressed where [mother] has gone with Friendship House, the fact that her therapist said she did some very meaningful work there on the issues that needed to be addressed. [¶] I also agree with what everyone has said here today . . . that it was brave and it was a—a good thing to do to go to Friendship House. I can’t find today that circumstances have completely changed. By the evidence you’ve submitted today, it

looks as though you've been recommended and have enrolled in [additional drug treatment programs] as a continuation of your drug treatment services in the nature of aftercare from your residential treatment program. So while you have done significant work, you have not completed the work that you started in May of this year on your additional or personal growth issues. [¶] But even if I did find that the evidence you've submitted established changed circumstances, I can't find today that you've met the second prong of the test which is it's in your children's best interest to offer additional family reunification or family maintenance services today. The children have adjusted to their living situation. They are with relatives that they are familiar with and love as family. They have the ability to be with their younger sibling. And the tribe who really has your interests and the children's interests at heart have supported the request that the children be offered permanency. So, sadly, despite the very good work you've done, I have to deny your request for change orders today . . . ." The court ordered a permanent plan of legal guardianship with the grandparents and dismissed the case.

Mother timely appealed.

## **DISCUSSION**

Mother argues that the court erred in denying her section 388 petition because her completion of drug abuse and domestic violence rehabilitation programs constituted changed circumstances, and because reinstating services was in the children's best interests due to the strong parent-child bond between mother and her children.

After reunification services are terminated, the focus of dependency proceedings shifts from the parent's interest in the care, custody, and companionship of the child to the child's need for permanence and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Even after this shift, a court may address a legitimate change in circumstance while protecting the child's need for prompt resolution of his or her custody status. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) A juvenile court order can be modified pursuant to section 388 if the parent seeking the change can establish changed circumstances or new evidence supporting the modification, and can also establish the change is in the child's best interest. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) The parent

requesting the change bears the burden of proving by a preponderance of the evidence that the change is justified. (*Ibid.*)

The denial of a section 388 petition is reviewed for abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318–319.) The juvenile court’s ruling will not be disturbed on appeal unless the decision is arbitrary, capricious, or patently absurd. (*Ibid.*) “It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion . . . .” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

Here, the trial court did not abuse its discretion in denying mother’s section 388 petition. As to changed circumstances, mother presented evidence that she recently completed the Friendship House program and received domestic violence counseling as part of that program, and also received a certificate from a women’s empowerment group. The trial court considered this evidence and commended mother for her efforts. But the evidence also showed that mother’s rehabilitation efforts were ongoing. Mother tested positive for drugs in March 2014—less than six months before filing her section 388 petition—and missed multiple drug tests after her positive test. Mother only completed the Friendship House program less than a month before filing her section 388 petition, and was enrolled in additional rehabilitation programs that she had not yet started. Because mother was still at an early stage of rehabilitation, it was within the court’s discretion to conclude that mother’s circumstances had not sufficiently changed to satisfy section 388’s changed circumstances requirement. (See *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [mother’s sobriety was not sufficient to show changed circumstances under section 388 when she was still in early stages of recovery].)

The court also acted within its discretion in finding that additional reunification or maintenance services were not in L.D.’s and Johnathan D.’s best interests. Mother argues that the children’s best interests are served by continuing reunification or maintenance services because the natural parent-child relationship is unique and far reaching. However, mother has not demonstrated that it would serve the best interests of L.D. and Johnathan D. to grant her further services while disrupting the permanence and stability the children have with their step-grandmother and grandfather. The evidence

showed that the children were being cared for by their step-grandmother for approximately a year-and-a-half before mother filed her section 388 petition, and that the children's needs were being met during that time. Both children had a close relationship with their step-grandmother and grandfather since the time they were born and were attached to them. Mother did not establish that she could offer the same level of stability as the grandparents. She missed scheduled visits with her children in March and April 2014 before she entered the Friendship House program, and she had not requested visits with the children since leaving Friendship House. In addition, mother's youngest child was detained in April due to mother's drug use while caring for the child. We cannot say on this record that the court abused its discretion in finding that mother did not establish that the children's best interests would be served by granting the section 388 petition and disrupting the permanency they would continue to receive if placed with their grandparents. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)<sup>6</sup>

#### **DISPOSITION**

The order of the court is affirmed.

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<sup>6</sup> Mother argues that the court's order providing for legal guardianship pursuant to section 366.26 must be reversed if we determine that the court abused its discretion in denying mother's petition under section 388. Because the trial court did not abuse its discretion with regard to mother's section 388 petition, we need not address this argument.

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Miller, J.

We concur:

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Kline, P.J.

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Richman, J.